

October 9, 2008

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VIA HAND DELIVERY

Carol Lumb
City of Tukwila
6300 Southcenter Boulevard, Suite 100
Tukwila, WA 98188

Re: Comments on City of Tukwila Shoreline Master Program Update

Dear Ms. Lumb:

We represent the James Campbell Co. LLC and The Realty Associates Fund VII, L.P., ("RAF") a Delaware limited partnership, both of which own property in the City of Tukwila.¹ We also represent International Airport Centers LLC, ("IAC") which owns property in the City's annexation area (parcel number 0001600060). On behalf of those entities, we submit the following additional comments on the City's draft Shoreline Master Program update ("SMP"). Copies of aerial photos of the subject properties are attached hereto for your reference.

We continue to be concerned with the lack of opportunity for genuine public participation in the City's SMP update process. We believe many if not all of the issues discussed below could be resolved in a mutually satisfactory way through a stakeholder's process, and encourage the City to set up such a process. Given the long time remaining prior to the deadline for the City's completion of the update, we cannot understand the City's resistance to public participation. This is particularly true given that the negative impacts of the draft SMP on existing and potential shoreline uses are contrary to the City's own comprehensive plan.

A. Applicability/Nonconforming Development

Our clients' properties are all developed with commercial/light industrial uses. Indeed, there are existing buildings and/or site improvements on the RAF and James Campbell properties located within the buffers proposed for the Urban Conservancy designation.² There are improvements of various types on the IAC property located within the buffer proposed for the High Intensity designation. It is critical to avoid any ambiguity regarding the status of existing

¹ The James Campbell Co. LLC owns various parcels including parcel numbers 7888900152, 7888900162, 7888900120 and 7888900160. The Realty Associates Fund VII, L.P., a Delaware limited partnership, owns parcel number 0223300010.

² In the case of both the RAF and James Campbell properties, the properties are protected by levees on top of which lies the Green River public access trail.

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legally established development within the shoreline area. (This subject was also addressed in our previous comment letter dated August 28, 2008, which is incorporated herein by reference.)

We urge the City to alter its approach so that the SMP contains a stand alone section that clearly addresses the application of the SMP to existing development and exactly how nonconformance issues will be handled. This section should be drafted based on input from existing property owners who have practical experience in the issues that arise in the operation of commercial properties. In particular, we request that provisions be added to the SMP addressing the following:

- Where an existing legally established structure or improvement is located partly or wholly within a required buffer under the SMP, whether the use of that structure is conforming shall be evaluated under the use provisions for the underlying zoning district, not the SMP's use provisions for the buffer area.

- Existing legally established structures that do not comply with the SMP's buffer requirements and/or the SMP's requirements regarding vegetation and landscaping may be continued and may be maintained, altered, remodeled, reconstructed, replaced, and/or expanded without complying with those buffer/vegetation/landscaping requirements, as long as the structure does not extend further into a required buffer.

- Existing legally established structures that do not comply with other SMP requirements may be continued and may be maintained, altered, remodeled, reconstructed, replaced, and/or expanded without complying with those requirements. Expansion under this provision is limited to a 25% increase in building footprint provided such expansion is consistent with all other building codes in force at the time of expansion.

- The foregoing provisions should apply even in the event that a structure is destroyed to 100% of its replacement cost and regardless of the amount of time a structure has been vacant (unless the structure has been entirely vacant for a period of four years or more)

B. Buffers

The draft SMP provides for a maximum buffer of 125 feet in the Urban Conservancy designation in levee areas, with the actual buffer width being that required to achieve a 2.5:1 slope on the river bank. This buffer requirement is legally impermissible for a number of reasons.

First, this "one size fits all" approach violates RCW 82.02.020. RCW 82.02.020 prohibits "any tax, fee, or charge, either direct or indirect," on the development of land, unless it falls within certain enumerated exceptions. Washington caselaw makes clear that a required open space set aside or similar limitation on the developable area of a property is a "tax, fee or charge" that is prohibited by RCW 82.02.020 when it is applied as a uniform percentage not tied to the property-specific impacts of development. *See Citizens' Alliance for Property Rights v. Ron Sims*, ___ P.3d ___ (No. 59416-8-I, July 7, 2008).

In *Citizens' Alliance*, the Court struck down a provision of a King County ordinance that limited clearing on rural property to a maximum of 50%. The Court held that the restriction was a "tax, fee or charge" on development, and that it was not reasonably necessary as a direct result of the proposed development. The Court reasoned that the King County provision "imposes a uniform requirement for cleared area on each lot, unrelated to any evaluation of the demonstrated impact of proposed development...the necessary proportionality that is required to fulfill the statutory exception is not satisfied." Thus, the Court held that the clearing limitation violated RCW 82.02.020. The draft SMP's buffer requirements suffer from the same defect.

Moreover, the conceptual basis for the proposed buffer is seriously flawed. There is no requirement in the draft SMP that the bank actually be re-sloped. Moreover, due to the cost and lack of benefit to private property owners, there is little likelihood of the bank being re-sloped by private property owners in the foreseeable future. Property owners would be free to develop or redevelop their properties without re-sloping the bank as long as they respected the 125-foot buffer. Indeed, there is little likelihood of significant public projects being undertaken to re-slope the bank in the foreseeable future. Such projects would require the consent of the private property owners and would be extremely expensive; the City has identified a limited number of restoration projects in the draft SMP, but does not propose a wholesale re-sloping of the river banks in the areas affected by the proposed buffers.

In this situation, the buffer requirement lacks any scientific basis from a habitat perspective. Absent re-sloping of the bank, any vegetation or revegetation inland of the top of the existing bank would be irrelevant from the perspective of improving riparian habitat. In any event, it bears emphasis that the existing river shoreline in the Urban Conservancy designation is largely lined with levees, in many cases with substantial vegetation on them and with public access trails on their tops. Any development or redevelopment will not disturb this arrangement. Simply put, buffers of the proposed width are unnecessary to meet the "no net loss" requirement of WAC ch. 173-26 and are unrelated to mitigation of any project impacts. At most the proposed buffers serve a potential, future restoration purpose by facilitating future restoration efforts. However, imposing such a burden on individual property owners to facilitate potential future restoration efforts is legally impermissible and beyond the City's authority under the Shoreline Management Act.

Moreover, it bears emphasis that a buffer of the width proposed for the Urban Conservancy designation would have a severe negative impact on shoreline property owners' property rights. A buffer of such width would occupy significant portions of the RAF and James Campbell properties; the same is true of many other shoreline properties in the Urban Conservancy designation. This would have a severe negative impact on the development potential of, and value of, these properties. At the same time, as noted above, the proposed buffer lacks connection to any project-specific impact or even any non-contingent restoration proposal. Moreover, to the extent that the buffer is proposed for flood control purposes, there is no indication that the levees have been insufficient to protect against flooding or that re-sloping the banks would provide the properties burdened by the proposed buffer with any flood

protection beyond that provided by the existing levees.³ As such, the proposed buffer violates the property owners' substantive due process rights under Washington law.⁴

We also have concerns about the buffer required in the High Intensity designation. The buffer requirement in the High Intensity designation suffers from many of the same legal defects discussed above. Again, the City has impermissibly taken a "one size fits all" approach. In addition, as in the case of the Urban Conservancy designation, restoration is a stated purpose of the buffer requirement. Despite the lack of levees in the High Intensity designation, the draft SMP arrives at the proposed 100 foot buffer width in that designation by reference to the same desired slope of 2.5:1 as is used for the levee areas. Setting buffer widths by reference to such an "ideal" slope, apart from site specific conditions and vegetation opportunities, is not supported as a scientific matter and is inconsistent with WAC ch. 173-26.

For the foregoing reasons, we request that the City rewrite the buffer requirements in the draft SMP so that buffers are established on a site-specific basis where, and only to the extent, necessary to address project-specific impacts and achieve "no net loss" of ecological functions necessary to sustain shoreline natural resources pursuant to WAC ch. 173-26. Certainly, in areas with existing levees topped with existing public access trails, we cannot see any justification for any buffer extending further inland from the trail. Buffers should not be a vehicle for "land banking" for potential future restoration or bank re-sloping efforts. If and when the City wishes to pursue a particular restoration and/or bank re-sloping project affecting a property, the City should be required to acquire, and compensate the property owner for, any needed private property.⁵

C. Development Standards

We request that changes be made to a number of the development standards contained in the draft SMP, as follows:

Site Design: The SMP's requirement that parking facilities, loading docks and service areas be located on the landward side of the development is inconsistent with fact that warehousing, distribution and similar uses are allowed in many places in the shoreline under the

³ Indeed, even if re-sloping the banks could improve flood control for properties elsewhere in the basin if pursued systematically, there is no evidence that piecemeal re-sloping of the banks would have a positive effect, rather than simply creating the potential for increased erosion.

⁴ A governmental action meets the requirements of substantive due process if the action (1) serves a legitimate public purpose, (2) is reasonably necessary to the achievement of that purpose, and (3) is not unduly oppressive upon a particular individual. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 131 (2005).

⁵ Finally, while we disagree with the conceptual basis for, and legal permissibility of, the City's approach to buffers in the Urban Conservancy designation, even if one accepted that basis, there is no logical reason why the buffer width should be 125 feet in all portions of the Urban Conservancy designation. The City set the 125-foot requirement based on the asserted need for room for a mid-slope "bench" to allow planting of vegetation consistent with Corps of Engineers requirements. There is no need for such a bench on levees not controlled by the Corps. Thus, even if a 125-foot buffer were appropriate for federally-certified levee areas, the buffer width in other levee areas should be no more than 100 feet.

City's SMP and zoning code. In the case of our clients' properties, such a requirement is inconsistent with the configuration of much existing development.⁶ In many places the foregoing requirement would result in such facilities facing the public street, which is both aesthetically and functionally problematic. With appropriate screening, such facilities should be able to be located on the river side without an inquiry into financial feasibility. Similarly, the requirement that blank walls be avoided "on the public and river sides of buildings" is nonsensical, as it would appear to preclude such walls anywhere, which is inconsistent with the types of uses allowed under the City's SMP and zoning code. Again, with appropriate screening, blank walls should be allowed when consistent with the nature of the use.

Height: The 45 foot height limitation between the landward edge of the river buffer and the edge of the shoreline area serves no apparent purpose and would hinder rational building design for many allowable uses. With appropriate landscaping, there is no reason why greater height should not be allowed – and, indeed, in many cases greater height will serve important public goals such as increasing economic vitality and allowing creative site design. We request that the SMP not impose height limits different from those in the zoning code.

Public Access: The requirement for public access on all properties that abut the Green/Duwamish Rivers is inappropriate. Public access should be required only where it can be provided in a usable and effective manner and where it is compatible with the principal use of the property.⁷ The DOE guidelines provided that "Local governments should plan for an integrated shoreline area public access system that identifies specific public needs and opportunities to provide public access. Such a system can often be more effective and economical than applying uniform public access requirements to all developments." The guidelines recognize that public access should not be required "where it is demonstrated to be infeasible due to reasons of incompatible uses, safety, security" or for various other reasons. Our clients have experienced serious security problems as a result of public access trails being located in close proximity to operational light industrial uses.

Thank you for your consideration of these comments. We understand that staff will be preparing responses to public comments, and we look forward to reviewing those responses. We would be happy to meet with staff to discuss specific language changes to address the foregoing concerns.

Very truly yours,

GORDON DERR LLP



Jeff S. Weber

⁶ We note that there is ambiguity in the application of the requirements where a property is adjacent to the shoreline on two sides or where the loading drive is perpendicular to the shoreline.

⁷ In addition, in some situations, requiring public access will run afoul of constitutional limitations.

cc: John Wanamaker

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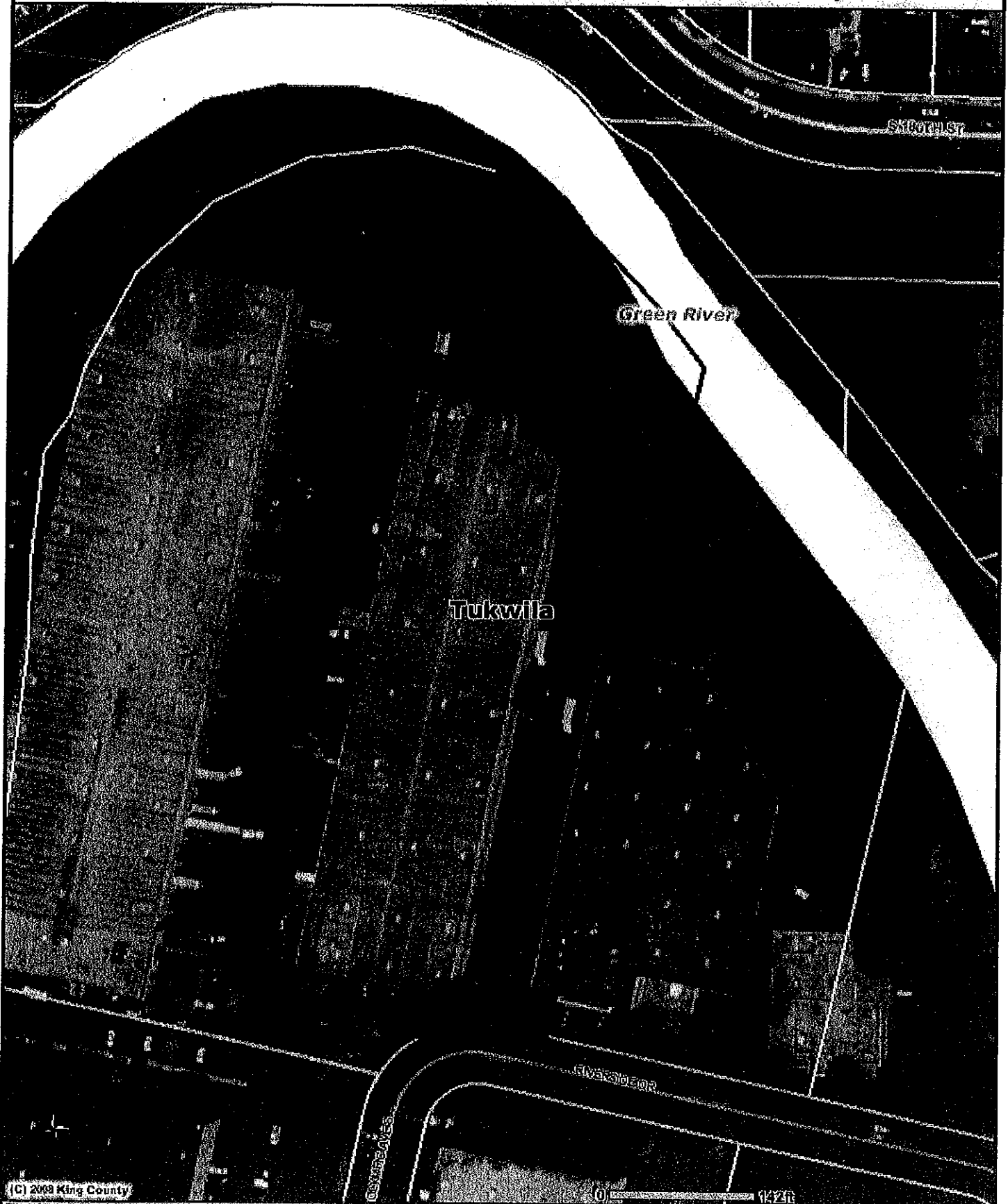
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James Campbell Co. LLC (7888900162)



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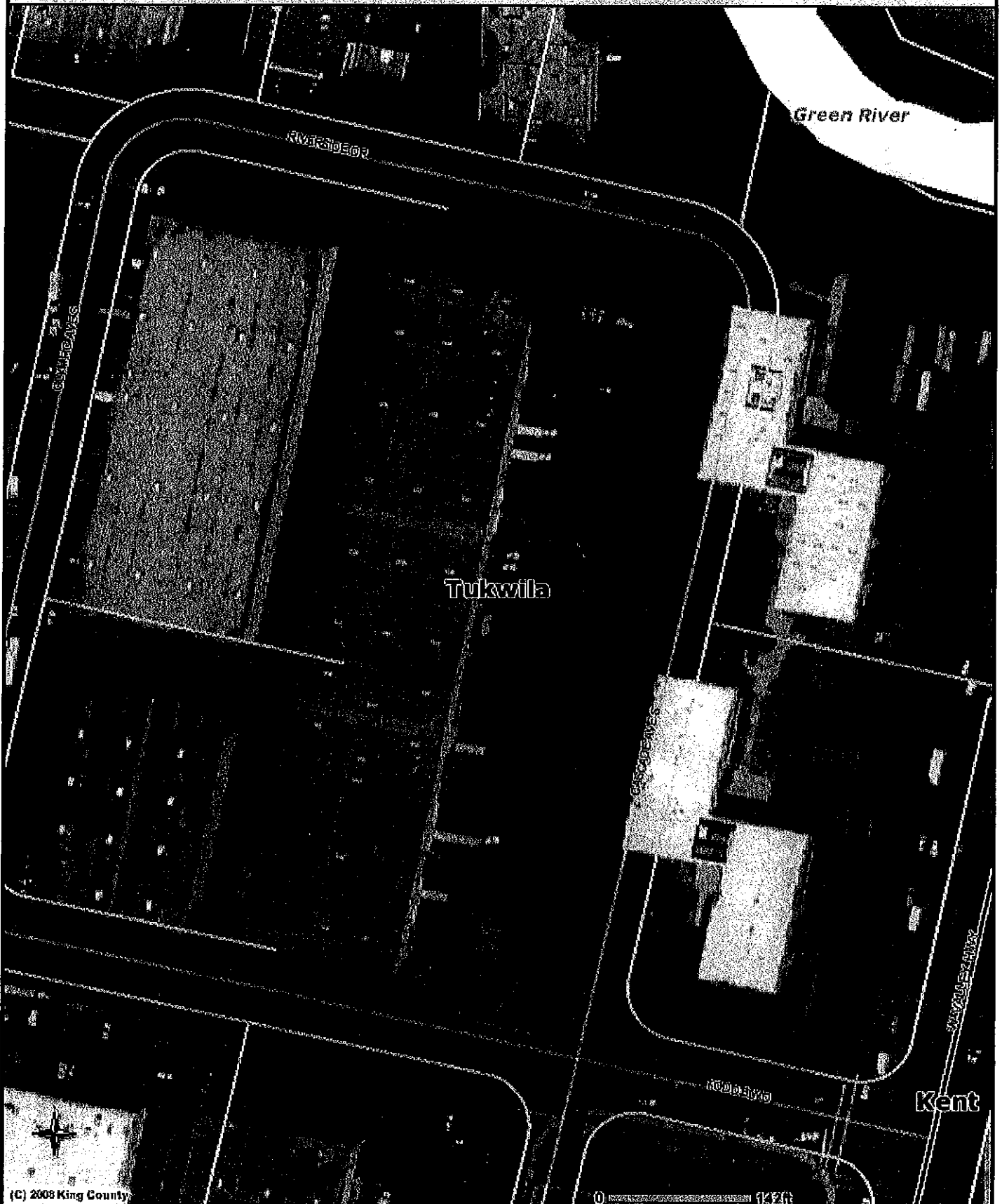
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CONCLUSION

Realty Associates Fund VII, L.P. (0223300010)



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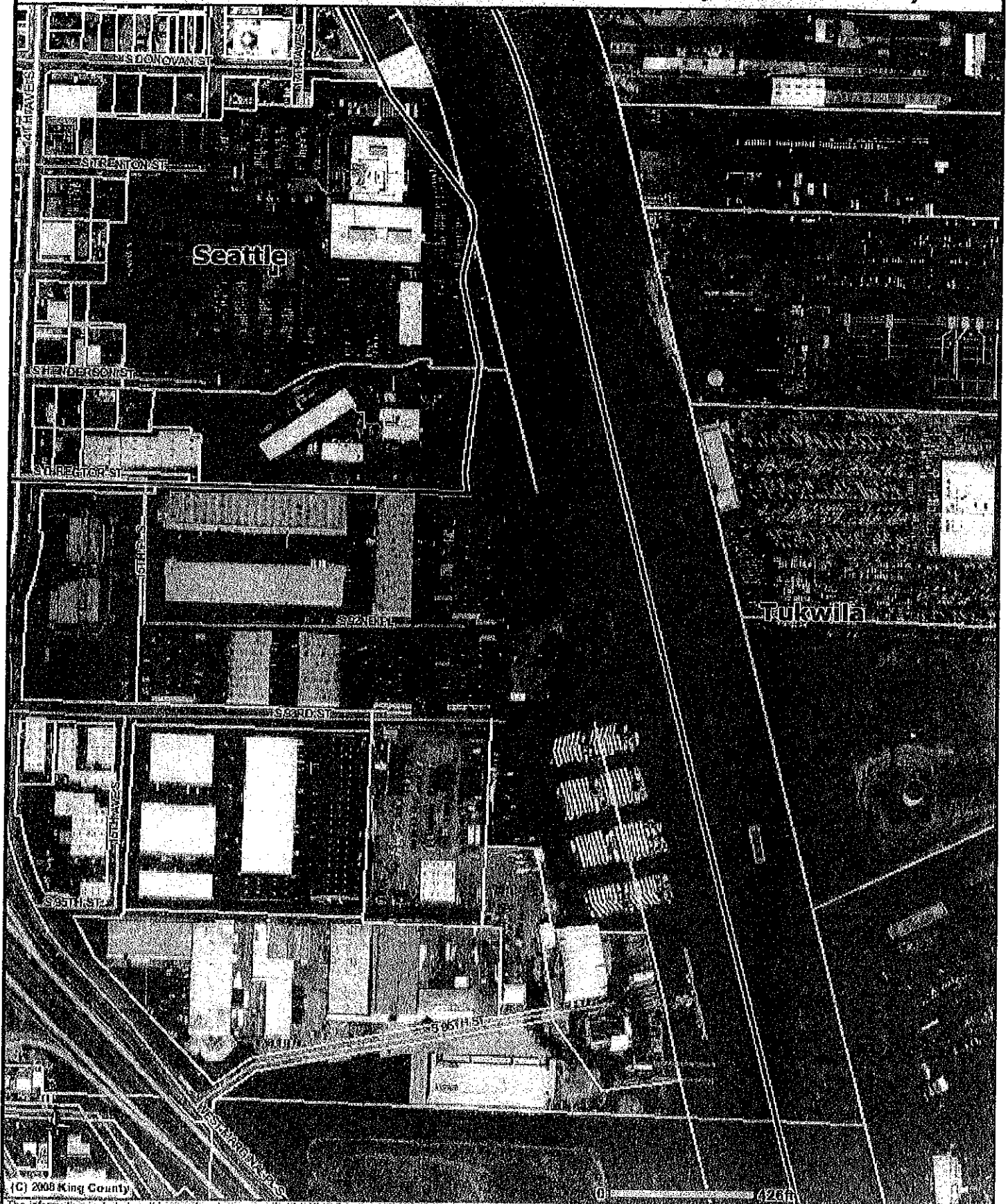
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